83-2154

CORRECTED COPY

NO.

in the Supreme Court of the United States

OCTOBER TERM, 1984

BOHDAN KOZIY, a/k/a BOGDANUS KOSIJ,
a/k/a BOHDAN KOZIJ.

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Organization of Ukranian Nationalists (OUN) was hostile to the United States when Petitioner applied for a visa.

2. Whether Petitioner was a member of the Ukranian Police and whether documentary evidence was improperly admitted.

3. Whether Petitioner's failure to disclose affiliation with the OUN or membership in the Ukranian Police violated 8 U.S.C. 1451(a).

4. Whether Petitioner's failure to disclose his war time activities violated 8 U.S.C. 1451(a).

5. Whether defense witnesses were improperly excluded.

6. Whether application of 8 U.S.C. 1451(a) violated Petitioner's right to due process of law guaranteed by the Fifth Amendment to the Constitution of the United States of America.

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BOHDAN KOZIY petitions for a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Eleventh Circuit, which affirmed a judgement of the United States District Court, for the

Southern District of Florida, which entered judgment for the United States of America in an action commenced by the United States of America to revoke Petitioner's naturalization.

OPINION BELOW

The opinion below is reported in 728 F.2d 1771 (11th Cir. 1984) and also appears as Exhibit A in the Appendix to this Petition. The opinion of the District Court appears as Exhibit B.

The symbol "AO" will stand for the Opinion of the Eleventh Circuit. The symbol "DO" will stand for the Opinion of the District Court. The symbol "T" will stand for the Transcript of the Trial.

JURISDICTION

The judgment below was entered February 27, 1984. (Exhibit B). Rehearing was denied April 2, 1984. Jurisdiction of this Court is conferred by 28 U.S.C. 1254(1) and by Rule 17(1)(a), Rules of the Supreme Court of the United States.

STATUTE INVOLVED

Title 8 U.S.C. 1451(a) provides in pertinent part:

§1451. Revocation of naturalization—Concealment of material evidence; refusal to testify.

(a) It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in sub section (a) of section 1421 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation . . .

STATEMENT OF THE CASE

Defendant-Appellant-Petitioner, MR. BOHDAN KOZIY, was born in the Stanislau region of the Ukraine in 1923. The Poles occupied the region in 1919; followed by the Russians in 1933; followed by the Germans in 1941; followed by the Russians in 1944. In 1944 Petitioner fled to Germany. After Germany surrendered, Petitioner lived in various displaced persons camps. He entered the United States in 1949 pursuant to a visa authorized under the Displaced Persons Act of 1948. Petitioner became a naturalized citizen of the United States in 1956.

The United States District Court; Southern District of Florida, on March 29, 1982 revoked Petitioner's citizenship and cancelled his certificate of naturalization for violation of 8 U.S.C. 1451(a). (A.O. 1773, 1774). The United States Court of Appeals, Eleventh Circuit accepted jurisdiction pursuant to 28 U.S.C. 1291 and affirmed February 27, 1984. Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit was timely filed. 28 U.S.C. §1254(1); 28 U.S.C. §2101.

REASONS FOR GRANTING THE WRIT

Petitioner asserts that the decision of the United States District Court and the decision of the United States Court of Appeals were achieved by a process wherein both courts selected evidence favorable to Government's position and virtually ignored evidence and established principles of law favorable to Petitioner, thus depriving Petitioner of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States. *Thompson v. City of Louisville*, 362 U.S. 199 (1961); *Garner v. Louisiana*, 368 U.S. 157, 163 (1961).

Petitioner asserts that in so deciding the above questions of fact and certain questions of law the District Court so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Petitioner asserts that the United States Court of Appeals in deciding certain questions of fact and of law so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Petitioner asserts that in sanctioning certain decisions of the District Court, the United States Court

of Appeals so far departed from the usual and accepted judicial proceedings as to call for an exercise of the Court's power of supervision. Rule 17(1)(a), Rules of the Supreme Court of the United States.

I. Whether the OUN was hostile to the United States when Petitioner applied for a visa.

The United States Court of Appeals framed the issue as follows:

> The only issue concerning affiliation with the OUN is whether the OUN was at the time under consideration hostile to the United States. (A.O. 1779)

The District Court found that the OUN was hostile to the United States at the time Petitioner applied for a visa. The United States Court of Appeals affirmed on the basis of the following evidence:

1. Witnesses testified that the OUN committed atrocities against Poles.

2. The OUN appeared on the inimical list compiled by the Displaced Persons Commission.

3. Resolution of the Second Congress of OUN which exhibited antisemitic ideology.

4. The Displaced Persons Commission had refused to issue visas to applicants who had been affiliated with the OUN.

5. The OUN killed Russian "partisans" during World War II. (A.O. 1777).

The Court's first point must be viewed in light of the fact that the witnesses' testimony was taken in Poland and the Soviet Union and preserved by video tape. Neither Petitioner nor his counsel were present. (D.O. Par. 42). Obviously, neither the Constitution of the United States nor the Federal Rules of Evidence were applicable. The witnesses' testimony was based upon matters that occurred forty (40) years earlier. The United States Court of Appeals did not refer to these facts nor indicate that it considered these facts in reaching its conclusion.

The Court's second point was that the OUN appeared on the inimical list of organizations hostile to the United States. The Displaced Persons Commission, at one time, mistakenly considered the OUN to be hostile to the United States. Subsequently the Commission realized that the OUN was not and had never been hostile to the United States and removed the OUN from the list. (T. Vol. 4, pp. 95, 96, 161). The United States Court of Appeals framed the issue as whether the OUN was hostile at the time Petitioner applied for a visa. Whether the Commission mistakenly considered the OUN to be hostile is immaterial. Further, no witness testified that the OUN appeared on the inimical list (albeit mistakenly) at the time Petitioner applied for a visa. The inimical list introduced at trial was not dated nor signed. (T. Vol. 6, p. 168). *United States v. Osidach*, 513 F.Supp. 51 (E.D. Pa. 1981) stated that the OUN had never been hostile to the United States.

Dr. Mirchuk, an expert on the holocaust testified that the OUN was not and never had been hostile to the United States. (T. Vol. 12, pp, 5-35; Vol. 14, p. 27-28).

The United States Court of Appeals in affirming the District Court's holding that the OUN had been hostile at the time Petitioner applied for a visa did not mention that the Commission's error in considering the OUN to be hostile was immaterial nor that the Commission recognized its error and deleted the OUN from the inimical list nor did it mention the *Osidach* opinon. The Court of Appeals chose not to mention the above even though Petitioner's appellate brief vigorously emphasized these points.

The Court's third point was not raised by the District Court and is not evidence of hostility to the United States.

The Court's fourth point is misplaced for the issue as framed by the Court of Appeals is whether the OUN was hostile—not whether the Commission mistakenly believed it to be.

As to the Court's fifth point, it is true that the OUN protected the Ukrainian people from aggression by Russian partisans. The distinction to be made is that the Russian partisans were not authorized by the Russian Army nor the Russian Government. The partisans preceded the Army. The OUN fought Nazis—as did the United States and Russia. All three were allied against the common enemy. The OUN would not attack the United States Army for it was the hope of the Ukrainian people. By the same token the OUN would

not attack the Russian Army. The force of the OUN was directed against its enemy—not against its ally.

The above distinction was emphasised in Petitioner's appellate brief. The United States Court of Appeals apparently ignored it.

II. Whether Petitioner was a member of the Ukrainian Police and whether documentary evidence was improperly admitted.

The United States Court of Appeals found that Petitioner was a member of the Ukrainian Police. The Court based this finding, in part, upon testimony of witnesses. (A.O. 1776).

As stated previously the witnesses were video taped in Poland and the Soviet Union. Neither Petitioner nor defense counsel were present. (D.O. par. 42). The safeguards of the United States Constitution and the Federal Rules of Evidence were not applicable. The witnesses were shown several photographs and asked to select the picture of Petitioner. Only one witness unequivocally identified Petitioner's photograph. Another witness selected the picture of another person. All other witnesses qualified their selection by statements such as "It looks like him", "It reminds me of him." (T. Vol. 5, pp. 32, 142; Vol. 7, pp. 134, 135, 136, 226; Vol. 8, pp. 250, 251; Vol. 9, pp. 159, 160). The United States Court of Appeals did not refer to these matters nor indicate that it considered them in reaching its conclusion. The Court did note that Petitioner presented witnesses who controverted the evidence and that Petitioner testified that he wore the uniform of a Ukrainian policeman as a disguise on occasion. The Court did not

mention that Petitioner also testified that he wore several other disguises as well. (T. Vol. 14, pp. 55, 59, 60, 210, 211, 241).

The District Court and the United States Court of Appeals found that the anmeldung and abmeldung constituted convincing evidence that Petitioner was a member of the Ukrainian police. Petitioner asserted that the documents and signature were forged and therefore the documents were not authentic and thus the documents were not material nor relevant and thus were inadmissible. The United States Court of Appeals relied in part, upon the testimony of Dr. Hilberg. It is apparent from Dr. Hilberg's testimony, quoted by the Court of Appeals, that Dr. Hilberg did not testify that the documents were authentic. (A.O. 1780) Dr. Hilberg was not qualified nor accepted as an expert on authentication of documents nor as an expert on anmeldungs and abmeldungs. He testified that the only such document that he had ever seen was an anmeldung presented to him during the Osidach trial. He also testified that his major book on the holocaust, *The Destruction of European Jews* made no reference to such documents. (T. Vol. 2, pp. 55, 62, 93).

The United States Court of Appeals ignored these points although they were argued in Petitioner's appellate brief.

The United States Court of Appeals relied upon the testimony of Dr. Cantu.

On direct examination Dr. Cantu testified that he was not able to find any evidence that would suggest

that the documents were prepared after their purported dates. (D.O. Par. 29 footnote 8). On cross examination by defense counsel Dr. Cantu was asked "Are you able to find any evidence that would suggest that these documents were prepared on their purported dates?" Dr. Cantu replied "No". (T. Vol. 14, p. 288). It is apparent that the direct testimony, although not proof of authenticity, was favorable to the Government. However, when the testimony on cross examination is considered, it is apparent that Dr. Cantu in effect stated that he had no proof that the documents were not forged. The District Court considered only the direct testimony. Petitioner's appellate brief explained this error and critized the District Court for ignoring the testimony given on cross examination. Yet the Court of Appeals, having the benefit of Petitioner's brief, committed the same error. This selectivity cannot be explained on the basis of varying degrees of credibility of different witnesses, for all of the testimony was given by Dr. Cantu.

The Court found that the documents were authenticated pursuant to Federal Rules of Evidence 902(3). The Court stated:

> A Russian official authorized to authenticate such documents attested to the anmeldung and the abmeldung. These documents, therefore, were self authenticated under rule 902(3). (A.O. 1780).

The requirements of the rule are not met by the testimony of the Russian official. The documents were kept in the Soviet Archives and conveyed to the Soviet Embassy in the United States to be brought to Court.

The fact that a document is certified to be housed in the Soviet Archives and conveyed to the Soviet Embassy in the United States does not authenticate the document under the rule. The document was signed "Messing, the Director of _____." Absent descriptive testimony, the signature does not authenticate the document. Authentication under the rule requires that the document must have been obtained from its place of natural custody. *Gibson v. Poor*, 21 N. H. 440 (1850);

Meath v. Winchester, 3 Beng. N.C. 183 (1836); *Doe v. Pearce*, 2 Moo. and Rob. 240 (1839). This requirement was not satisfied for there was no testimony by the Russian official nor any other witness as to how the document was procurred by the Russians, where its natural place of custody was, or where it had previously been housed, or from whom it was received. The United States Court of Appeals did not refer to these impediments to authentication although they were discussed in Petitioner's appellate brief.

The District Court held that the documents and signatures were authentic. This holding was based upon the testimony of two witness, Professor Hilberg and Dr. Cantu. Neither was a handwriting expert and neither testified that the signatures were authentic. The testimony of both witness has been described previously herein. Government placed the name of a handwriting expert, Mr. Epstein, on the witness list. Government possessed samples of Petitioner's handwriting and the documents in issue for Mr. Epstein's examination and analysis. Government chose not to call Mr. Epstein as a witness.

Petitioner presented handwriting expert, Ms. RENEE MARTIN, who had examined the documents

and proffered that she would testify that the documents and signatures were forgeries. The District Court did not permit Ms. Martin to testify because her name was not placed on the witness list within the time limit set by the District Court's pre-trial order. This issue will be discussed subsequently herein.

Petitioner testified that the signatures were forgeries. He stated that the document exhibited the handwriting of three different persons and incorrectly listed his birthdate as 1920 instead of 1923. He asserted that had he executed the document that all the handwriting would have been consistent and that he would not have erred by three (3) years on his date of birth. (T. Vol. 14, p. 112-114).

The United States Court of Appeals stated:

> Whether or not the anmeldung or the abmeldung were forgeries fails to go to their admissibility, but rather to the weight of the evidence. The documents are relevant and material. (A.O. 1780, 1781).

Contrary to the above statement, authentication is a condition precedent to admissibility, Rule 90(a), Federal Rules of Evidence. Government failed to prove that the documents were authentic. Govenment failed to controvert Petitioner's evidence that the signatures were forged. Government presented no evidence that the signatures were those of Petitioner. This Court of Appeals failed to respond to these points of evidence even though they were argued in Petitioner's appellate brief.

Petitioner's appellant brief argued that Petitioner's affiliation with the OUN was strong evidence that he was not a member of the Ukrainian police.

There is no doubt that Petitioner was affiliated with the OUN. He so testified and the District Court so held.

There is no doubt that persons affiliated with the OUN and members of the Ukrainian Police were mortal enemies. Dr. Mirchuk's testimony, the Displaced Persons Commission, the *Osidach* opinion and the recognized history of World War II establish that the OUN was an underground movement dedicated to protecting Ukrainian citizens from Nazi aggression. The Ukrainian Police were controlled by the Nazis and were used by the Nazis to suppress, control, punish and execute the Ukrainian people. (T. Vol. 12, p. 5-35; Vol. 14, pp. 27, 28). Petitioner assisted the OUN at the risk of his life. He was wounded and hospitalized. (T. Vol. 14, pp. 70, 72, 81, 83). It is totally contradictory to assert and hold, as the District Court did, that he was affiliated with the OUN and also a member of the Ukrainian Police. The Government did not argue, and the District Court did not hold, that Petitioner's infiltrated the Ukrainian Police for the benefit of the OUN.

Petitioner's appellate brief strongly urged that the above argument was compelling. The United States Court of Appeals affirmed the District Court without stating that it considered the above argument in reaching its decision.

III. Whether Petitioner's failure to disclose affiliation with the OUN or membership in the Ukrainian Police violated 8 U.S.C. 1451(a).

Petitioner asserts that he did not violate 8 U.S.C. 1451(a) for failing to disclose that he was a member of the Ukrainian Police because he was not a member. Argument on this point will not be repeated.

Petitioner was affiliated with the OUN and did not disclose that fact to United States officials. However, failure to disclose is not a violation of 8 U.S.C. 1451(a) absent a duty to disclose and no duty exists unless the application form or the questions of the interviewer inquires about the fact in issue. 3 Gordon and Rosenfield §20.46 at 20-14, 15; *Cufari v. United States*, 217 F.2d 404, 409 (1st Cir. 1954); *United States v. Accardo*, 113 F.Supp. 783, 785, 786 (D.N.J. 1951). The interviewer asked about specific organizations such as the communist party, but did not inquire about membership nor affiliation in the OUN. (T. Vol. 14, pp. 97-100). Since the OUN was not a formal organization but rather a group of people banding together for a common cause under the title of OUN and, in view of the fact that the Petitioner was a mere sympathizer with the OUN and not a member thereof, it was not apparent that he should list the OUN on his application for a visa. It should be noted that the interview with the Petitioner lasted no more than five (5) minutes.

Failure to disclose a fact is not a violation of 8 U.S.C. 1451(a) unless the fact is material—*Fedorenko v. United States*, 449 U.S. 490 (1981). A material fact is one which if not concealed would result in denial of

citizenship. *Chaunt v. United States*, 364 U.S. 350 (1960). Since the OUN was not and never had been hostile to the United States, failure to disclose affiliation was immaterial. *United States v. Osidach, supra.* In fact, persons who were similarly affiliated with the OUN have been granted visas and naturalized as citizens despite their affiliation with the OUN having been made known.

The District Court did not indicate that it considered the above arguments. Petitioner's appellate brief argued the above points citing authority. The United States Court of Appeals affirmed without indicating that it considered Petitioner's arguments in reaching its conclusion.

IV. Whether Petitioner's failure to disclose wartime activities violated 8 U.S.C. 1451(a).

The District Court held that Petitioner failed to disclose his wartime activities and therefore lacked moral character—a prerequisite to citizenship. The United States Court of Appeals affirmed. (A.O. 1777).

The wartime activities in issue are the alleged persecution of Ukrainian citizens by Petitioner as a Ukrainian Policeman.

Petitioner has previously argued herein that it is inconceivable that he, a sympathizer of the OUN, could be a Ukrainian Policeman. That argument, of course, applies with equal force to rebut allegations that he persecuted his own people as a Ukrainian Policeman. It is absurd to assert that he persecuted the very people that he risked his life to protect. As a member of the

OUN underground movement he deserves to be regarded as a hero of his country rather than an immoral persecutor of his people.

Petitioner's appellate brief asserted the above argument as strongly as possible. The United States Court of Appeals did not indicate that it considered the argument in reaching its decision.

V. Whether defense witnesses were improperly excluded.

The District Court excluded two defense witnesses, Mr. O'Connor and Ms. Martin because their names were not placed on the witness list within the time set in the District Court's pre-trial order. In such cases the court, in its discretion, may exclude the witnesses or permit them to testify. The Court is required to consider certain factors in the exercise of its discretion. The factors will be discussed subsequently herein. As far as the record shows the District Court did not consider any factors recognized in law. Rather the District Court based its decision on the fact that the witnesses were not disclosed within the deadline (T. Vol. 2, pp. 12, 13) and on the fact that the United States Attorney refused to consent to the admission of the witnesses. The District Court stated:

> I understand that. In the absence of an agreement by the Government, if the Government wishes to agree to allow that in, all right. I will let in testimony that the Government might want to present that wasn't described, or the names of witnesses who weren't described then if you agree, Mr. Carlton, but I

will not do it without agreement of counsel. (Vol. 2, p.13,14).

It is obvious from the above that the District Court departed from the essential requirements of law. Not only did it fail to consider the recognized factors to be considered in the exercise of its discretion, it considered preferential factors. The District Court went beyond the abuse of discretion, it acted arbitrarily.

All of the above arguments were stated in Petitioner's appellate brief. The United States Court of Appeals failed to address any of the points so raised.

The Court of Appeals found that defense counsel wilfully failed to disclose that he had located Mr. O'Connor, and that defense counsel had acted in bad faith in failing to obtain Ms. Martin prior to the deadline. The Court did not suggest that defense counsel gained advantage, and indeed he did not. Ten days after the United States Attorney informed defense counsel that the Government intended to introduce a handwriting expert, Mr. Epstein, defense counsel procured Ms. Martin and arranged that she be deposed by Government before trial began. The Government fully deposed said witness and investigated her background and qualifications prior to commencement of the trial. The Government was not prejudiced nor surprised by defense counsel's proposed expert witness.

Mr. O'Connor is perhaps the only person alive who served as a member of the Displaced Persons Commission at the time Petitioner applied for a visa. The search for Mr. O'Connor was not easy. Had these facts been considered, the Court of Appeals would not have found that defense counsel acted wilfully and in bad faith.

The factors to be considered by the courts in the exercise of their discretion are listed and discussed in *Meyers v. Pennypack Woods Home Ownership Association*, 559 F.2d 984, 904, 905 (3d Cir. 1977). *Meyers* discussed factors considered in previous cases and concluded.

Underlying the cases to which we have adverted are these basic considerations: (1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified, (2) the ability of that party to cure the prejudice, (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court, and (4) bad faith or willfulness in failing to comply with the court's order.

The United States Court of Appeals cited *Meyers* and considered various factors but failed to apply the above set of standards. Petitioner's brief contains a detailed analysis of the application of these standards, which the United States Court of Appeals apparently ignored.

The first factor concerns prejudice or surprise to Government.

Even though the Court of Appeals acknowledged that Government deposed Ms. Martin prior to trial, the Court stated that had Ms. Martin been permitted to testify that the prosecution would have been unfairly surprised because the Government attorney who took her deposition was not involved in the dispute. (A.O. 1779, 1780). In fact, Mr. Wolf, the United States Attorney in charge of the prosecution ordered that Government

attorney to take Ms. Martin's deposition. There was no surprise.

Mr. O'Connor was offered for deposition and Government chose not to depose him. In all events Government had the knowledge or the opportunity to obtain the knowledge in ample time to avoid prejudice or surprise.

The second item concerns the opportunity to cure any prejudice or surprise. There was no prejudice or surprise.

The third item concerns whether waiver of the rule would disrupt the orderly trial of the case. Under the above facts the trial would not have been affected in any way. Apparently the District Court did not consider that permitting testimony of the witnesses would disrupt the trial for he was willing to permit their testimony if the Government agreed.

The fourth item involves bad faith or willfulness. The defense advised Government of the witnesses as soon as the defense had such information. The defense arranged for depositions in time to avoid delay, disruption or prejudice. Defense gained no advantage whatsoever.

In addition to the above factors, Courts consider the relative harm done if the witnesses are excluded. *Meyers v. Pennypacker, supra.* In the instant case permitting testimony would not prejudice the Government. The exclusion of the witnesses deprived Petitioner and the Court of evidence which could have been dispositive of whether the signatures on the anmeldung and abmeldung were forged and whether the Displaced Persons Commission considered the OUN

to be hostile to the United States at the time Petitioner applied for a visa—an issue that the District Court considered to be important.

The exclusion of evidence in such cases is an extreme sanction not normally to be imposed in absence of willful deception or flagrant disregard. *Dudley v. South Jersey Metal Inc.*, 555 F.2d 9, 6, 99 (3d Cir. 1977).

The ends of justice required that the witness be allowed to testify in *Meyer v. Pennypacker, supra.* Petitioner's brief contained a detailed analysis of *Meyers* —the facts of *Meyers* and demonstrated that the facts in the instant case are more compelling.

Petitioner's brief contained all of the above arguments and numerous citations of authority. The United States Court of Appeals did not indicate that it considered these matters in reaching its conclusion.

VI. Whether application of 8 U.S.C. 1451(a) violated Petitioner's right to due process of law guaranteed by the Fifth Amendment to the Constitution of the United States of America.

The Current version of 8 U.S.C. 1451(a) provides that citizenship may be revoked if the individual illegally procured citizenship. The version of the law in effect at the time Petitioner obtained citizenship did not contain the "illegal procurement" provision. The District Court applied the current version to Petitioner. This procedure raises issues relating to illegal procurement. This fact raises the issues of the ex post facto prohibition and the violation of Due Process of Law guaranteed by the

Fifth Amendment to the Constitution of the United States.

Petitioner recognizes that the Supreme Court of the United States has held that the ex post facto prohibition is not applicable to deportation. However, *Galvan v. Press*, 347 U.S. 522 (1954) indicates that the Supreme Court of the United States recognizes the harshness of the rule and is not totally comfortable with the results. The Court stated:

> And since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the *ex post facto* Clause, even though applicable only to punitive legislation, should be applied to deportation.
>
> But the slate is not clean. As to the extent of the power of Congress under review, there is not merely "a page of history," *New York Trust Co. v. Eisner*, 256 U.S. 345, 349, 41 S.Ct. 506, 507, 65 L.Ed. 963, but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. *Kaoru Yamataya v. Fisher* (The Japanese Immigrant Case), 189 U.S. 86, 101, 23 S.Ct. 611, 614, 47 L.Ed. 721; *Wong Yang Sun v. McGrath*, 339 U.S. 33, 49, 70 S.Ct. 445, 453, 94 L.Ed. 616. But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly inbedded in the

> legislative and judicial tissues of our body politic as any aspect of our government. And whatever might have been said at an earlier date for applying the *ex post facto* Clause, it has been the unbroken rule of this Court that it has no application to deportation. (at 742-743).
>
> (531)

The dissent in *Galvan* suggests that the accused rights may be appropriately protected under the due process clause.

> I cannot agree that because a man was once a Communist, he always must carry the curse. Experience teaches otherwise. It is common knowledge that though some of the leading Socialists of Asia once were Communists, they repudiated the Marxist creed when they experienced its ugly operations, and today are the most effective opponents the Communists know. So far as the present record shows, Galvan may be such a man. Or he may be merely one who transgressed and then returned to a more orthodox political faith. The record is wholly silent about Galvan's present political activities. Only one thing is clear: Galvan is not being punished for what he presently is, nor for an unlawful act, nor for espionage or conspiracy or intrigue against this country. He is being punished for what he once was, for a political faith he briefly expressed over six years ago and then rejected.
>
> This action is hostile ot our constitutional standards, as I pointed out in *Harisiades v. Shaughnessy*, 342 U.S. 580, 598, 72 S.Ct. 512,

523, 96 L.Ed. 586. Aliens who live here in peace, who do not abuse our hospitality, who are law abidding members of our communities, have the right to due process of law. They too are "persons" within the meaning of the Fifth Amendment. They can be molested by the government in times of peace only when their presence here is hostile to the safety or welfare of the Nation. If they are to be deported, it must be for what they are and do, not for what they once believed. (at p. 744-745).

(534)

The loss of citizenship deprives a person of "all that makes life worth living". *Ny Fung Ho v. White*, 259 U.S. 376, 42 S.Ct. 492 (1921). "Deportation is a drastic measure and at times the equivalent of banishment or exile. *Fong How Fan v. Phelan*, 333 U.S. 6, 10, 68 S.Ct. 374, 376 (1947). In the instant case deportation may be the equivalent of a death sentence.

The Government does not claim that Petitioner committed criminal acts prior to World War II. His activities in World War II are those of an unselfish and patriotic member of a heroic underground movement. His life in the United States has been exemplary. The Government does not charge that he has committed any anti-social, much less criminal, act since entering the United States. The Government does not assert that he is a disruption to any segment of society.

The findings against him are based on unreliable evidence taken in an unreliable manner. It is based upon selection by two Courts of facts favorable to Government to the almost complete exclusion of facts and law favorable to Petitioner. It is a departure from

the essential requirements of law and denies Petitioner due process of law. This denial of due process coupled with the argument asserted in the dissent in *Galvan v. Press, supra*, warrants reversal.

The United States Court of Appeals acknowledge the due process argument presented in Petitioner's appellate brief but did not respond to that issue. Rather, the Court was content to cite precedent for the proposition that the ex post facto prohibition is not applicable to deportation.

CONCLUSION

Petitioner has demonstrated herein that both courts below ignored evidence and law favorable to Petitioner. In so doing, the courts below so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Therefore, Certiorari should be granted and the judgment of the United States Court of Appeals and the District Court reversed.

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PHILIP CARLTON, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the Petition for Writ of Certiorari was mailed first class, postage prepaid to the Solicitor General, Department of Justice, Washington, D.C., 20530. I further certify that all parties required to be served have been served this 29 day of June, 1984.

Philip Carlton, Jr.

PHILIP CARLTON, JR.

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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

UNITED STATES of America,
Plaintiff-Appellee,

v.

Bohdan KOZIY, a/k/a Bogdanus Kosij,
a/k/a Bohdan Jozij,
Defendant-Appellant.

No. 82-5749.

United States Court of Appeals,
Eleventh Circuit.

Feb. 27, 1984.

Appeal from the United States District Court for the Southern District of Florida.

Before HENDERSON and HATCHETT, Circuit Judges, and JONES, Senior Circuit Judge.

HATCHETT, Circuit Judge:

The appellant, Bohdan Koziy, appeals an order of the United States District Court, 540 F.Supp. 25, for the Southern District of Florida, revoking his citizenship pursuant to 8 U.S.C.A. §1451(a) which provides that citizenship must be revoked if it was illegally procured,

or procured by concealment of a material fact or by willful misrepresentation.[1] After a review of the record, we find the district court committed no error and therefore, we affirm.

FACTS

Before the outbreak of World War II, the Stanislau region was part of Poland. In 1939, Germany and Russia invaded the region and agreed to divide the territory; the Russians gained control of the Stanislau area. On June 22, 1941, Germany invaded Russia and the Germans occupied the region. The towns of Lisets and Stanislau lie within the Stanislau region.

From 1941 until its surrender in 1945, Germany attempted to annihilate the Jewish people residing within its occupied territories. The task of killing millions of Jewish people was so enormous it required the aid of the indigenous population. In the Stanislau region, the Ukranian Police aided the Germans in their task by guarding the Jewish ghetto in Stanislau and killing

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[1]Title 8 U.S.C.A. §1451(a) provides in pertinent part:

§1451. Revocation of naturalization—Concealment of material evidence; refusal to testify.

(a) It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 1421 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation . . .

Jewish residents. They also aided the Germans in deporting the Jewish people to extermination camps.

Bohdan Koziy was born on February 23, 1923, in the town of Pukasiwci, located in the Stanislau region. From 1936 through 1939, Koziy attended various schools in the Stanislau region. In 1939, Koziy became involved in the Organization of Ukranian Nationalists (OUN) which was dedicated to the establishment of an independent Ukranian state. He remained active in the organization until 1944. In 1944, fleeing the Russian advance, Koziy and his family moved to Heide, Germany, where he worked as a farmer. After the Germans surrendered in 1945, the Koziys lived in various displaced persons camps. The Displaced Persons Commission (DPC) operated these camps to establish an orderly method of resettling World War II refugees. After the DPC interviewed Koziy, he entered the United States on December 17, 1949, under the Displaced Persons Act of 1948. On April 25, 1955, Koziy filed his application to file a petition for naturalization. On July 25, 1955, he filed a petition for naturalization and on February 9, 1956, Bohdan Koziy became a United States citizen.

On November 20, 1979, the United States brought this action pursuant to 8 U.S.C.A. §1451(a), to revoke and set aside the order of the Supreme Court of New York, Oneida County, on February 9, 1956, admitting Koziy to United States citizenship. The United States also requested the cancellation of Koziy's certificate of naturalization. The United States alleged that Koziy had illegally procured his citizenship by concealment of a material fact or by willfull misrepresentation by failing to disclose his involvement in the Ukranian police and the OUN. Koziy denied involvement in the

Ukranian police and contended his actions in the OUN were insufficient to support revocation of his citizenship.

The district court agreed with the United States. It held Koziy's failure to reveal his activities in the Ukranian Police and the OUN made him ineligible to receive a visa under the Displaced Person's Act of 1948 (Act). Therefore, Koziy was unlawfully admitted to the United States and his citizenship was illegally procured. The failure to disclose his activities in the Ukranian Police and the OUN also provided the basis for the district court's ruling that Koziy had procured his citizenship by concealment of a material fact.

The district court found that the Ukranian Police and the OUN were organizations hostile to the United States. Koziy's affiliation with those organizations resulted in his ineligibility for a visa under section 13 of the Act which prohibits the issuance of a visa to anyone who was a "member of, or participated in, any movement hostile to the United States or the form of government of the United States."

The district court also found that Koziy assisted enemy forces and persecuted civilians thereby making him ineligible for a visa under section 2(b) of the Act. The Act declares that anyone who has "assisted the enemy in persecuting civil populations of countries . . . or voluntarily assisted the enemy since the outbreak of the second world war in their operations against the United Nations" is of no concern to the Displaced Persons Commission. If the DPC was unconcerned with Koziy, he was ineligible for a visa under section 2(b).

The district court ruled that Koziy's failure to disclose his connections with the Ukranian Police and the OUN on his immigration forms made him ineligible for a visa under section 10 of the Act which precludes the issuance of a visa to any person "who shall willfully make a misrepresentation for the purpose of gaining admission into the United States." The district court also ruled Koziy lacked good moral character which is a prerequisite for admission into the United States under 8 U.S.C.A. §1427(a)(3) by failing to reveal his wartime activities. Additionally, the district court revoked Koziy's citizenship pursuant to 8 U.S.C.A. §1451(a) because his failure to disclose his connections with the Ukranian Police and the OUN resulted in his procuring citizenship by concealment of a material fact.

Koziy raises four issues on appeal. (1) Koziy contends the district court erred in finding he was a member of the Organization of Ukranian Nationalists (OUN) and the Ukranian Police. (2) Koziy argues the district court erred in excluding two defense witnesses whose names were not disclosed by his attorney within the time set in the court's pretrial order. (3) Koziy claims the district court violated the ex post facto clause and the due process clause by revoking his citizenship on the ground of illegal procurement. Koziy contends that at the time he obtained citizenship, the statutory provisions for denaturalization did not include legal procurement, and therefore, the district court's reliance on illegal procurement as a basis for denaturalization violated the due process clause and the ex post facto clause. (4) Koziy argues the district court erred in admitting into

evidence and anmeldung, an abmeldung, and an inimical list.[2]

I. The Trial Court's Revocation of Koziy's Citizenship Pursuant to 8 U.S.C.A. §1451(a).

Title 8 U.S.C.A. §1451(a) provides two methods for revocation of an individual's citizenship: (1) If the individual illegally procured his citizenship, or (2) if citizenship were procured by concealment of a material fact or wilful misrepresentation.

a. Illegal Procurement of Citizenship

[1] Citizenship is illegally procured if "some statutory requirement which is a condition precedent to naturalization is absent at the time the petition is granted." H.R.Rep. 1086, 87 Cong., 1st Sess. 39, reprinted in [1961] U.S.Code Cong. & Admn. News, 2950, 2983. *See also, Fedorenko v. United States*, 449 U.S. 490, 515, 101 S.Ct. 737, 751, 66 L.Ed.2d 686 (1981). Lawful admittance to the United States is a statutory condition precedent to naturalization. 8 U.S.C.A. §1429. If Koziy were ineligible for a visa, he would be unlawfully admitted to the

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[2]An anmeldung was a document the Ukranian police utilized to apply for various types of insurance when beginning their job. An abmeldung is a form the Ukranian police used when leaving their job. The inimical list was a list the Displaced Persons Commission (the Commission which regulated the immigration of World War II refugees to the United States) compiled listing all organizations hostile to the United States. If a person seeking admission to the United States under the Displaced Persons Act was a member of any of the listed organizations, the Commission prohibited his admittance.

United States. The United States produced various witnesses to testify to Koziy's affiliations with the Ukranian Police and the OUN. Involvement with the Ukranian Police or the OUN would preclude Koziy from receiving a visa under the Displaced Persons Act of 1948.

The United States produced witnesses who testified they say Bohdan Koziy in a Ukranian police uniform killing unarmed civilians in the town of Lisets. Josef-Waclaw Jablonski testified he saw Koziy at least once a week in a Ukranian police uniform. He also saw Koziy kill the Singer girl and members of the Kandler family. Jablonski stated that he was 100 percent positive that Koziy committed both acts. Anton Vatseb corroborated Jablonski's story. Vatseb testified he saw Koziy kill the Kandlers and the Singer girl. Vatseb also testified he was with Jablonski when Koziy shot the Singer girl. Vatseb stated that the Kandler family was shot in the same fashion as Jablonski had stated. Three witnesses, Anna Snigur, Maria Antoniva Il'Kovs'Ka, and Josif Frankovich Il'Kovs'Kii, testified that they saw Koziy kill the Bredgolt family while wearing a Ukranian police uniform.

The United States also produced two exhibits which corroborated the witnesses' testimony declaring that Koziy was a member of the Ukranian police force. The anmeldung and the abmeldung, Ukranian police employment forms, both contained Koziy's signature. Each document represented Koziy's affiliation with the Ukranian police. Koziy, however, claims he was never employed in the Ukranian police force.

Koziy presented his testimony and the testimony of two witnesses to refute the government's contention that he was a member of the Ukranian police force. First, his wife testified and contended that Koziy was never a member of the Ukranian police force. Second, Wasyl Ostapiak, a resident of the town of Lisets during World War II, testified he never saw Koziy in a Ukranian police uniform. Koziy himself took the stand and declared he was never involved in the Ukranian police force. Koziy, however, did state that he wore the uniform of the Ukranian police force on a few occasions as a disguise to conceal his membership in the OUN. Koziy contends this evidence displays in non-affiliation with the Ukranian police force.

[2] To prevail in a denaturalization proceeding, the government must prove its case by clear, convincing, and unequivocal evidence, and leave no issue in doubt. *Fedorenko v. United States*, 449 U.S. 490, 505, 101 S.Ct. 737, 746, 66 L.Ed.2d 686 (1981); *United States v. Chaunt*, 364 U.S. 350, 353, 81 S.Ct. 147, 149, 5 L.Ed.2d 120 (1966); *Schneiderman v. United States*, 320 U.S. 118, 125, 63 S.Ct. 1333, 1336, 87 L.Ed. 1796 (1943). The district court held that the government fulfilled its burden of showing Koziy's membership in the Ukranian police. It found that Koziy was ineligible for a visa under the Displaced Persons Act and was never lawfully admitted into the United States. The district court, therefore, held that Koziy had illegally procured his citizenship because he had failed to fulfill a statutory condition precedent to naturalization.

[3, 4] In reviewing factual findings of the district court, we are bounded by the clearly erroneous standard

of Fed.R.Civ.P. 52(a). *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 855, 102 S.Ct. 2182, 2188, 72 L.Ed.2d 606 (1982); *United States v. United States Gypsum Co.*, 333 U.S. 364, 394-95, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948); *Wilson v. Thompson*, 638 F.2d 799, 801 (5th Cir.1981). The district court's factual findings concerning Koziy's affiliation with the Ukranian police are not clearly erroneous.

[5] The only issue concerning Koziy's affiliation with the OUN is whether the OUN was, at the time under consideration, hostile to the United States. Koziy testified that he was extensively involved with the OUN's activities during World War II. The United States presented the same witnesses who testified about Koziy's shooting innocent civilians to report about the OUN's hostility towards the United States. These witnesses testified that the OUN committed atrocities against Polish civilians who were United States allies. The United States also introduced a document which the Displaced Persons Commission formulated exhibiting all organizations considered hostile to the United States. The OUN was listed on it. The United States produced the resolution of the Second Congress of the OUN which exhibited the OUN's anti-semitic ideology. The government also displayed various applications for admission to the United States which the DPC denied because of the individuals' affiliations with the OUN.

To rebut the government's contention that the OUN was hostile to the United States, Koziy presented an expert witness on the OUN, Dr. Petro Murchuk. He testified that the OUN was never hostile to the United

States.[3] Koziy also testified declaring that the OUN was never hostile to the United States. Koziy, however, stated that the OUN killed Russian partisans during World War II. The United States and Russia were allies during World War II.

The district court found that the government had fulfilled its burden of proof with respect to Koziy's involvement with the OUN and held that Koziy was ineligible for a visa, and therefore was never lawfully admitted into the United States. It ruled Koziy had illegally procured his citizenship. We fail to find the district court's factual findings regarding Koziy's affiliations with the OUN clearly erroneous. *Hamm v. Members of the Board of Regents of the State of Florida* 708 F.2d 647, 650 (11th Cir.1983); *Lincoln v. Board of Regents of the University System of Georgia*, 697 F.2d 928, 939 (11th Cir.1983).

[6] Being of good moral character is another statutory condition precedent to naturalization. 8 U.S.C.A. §1427(a)(3). A person who has given false testimony for the purpose of obtaining benefits under the immigration law lacks goods moral character. 8 U.S.C.A. §1101(f)(6). The district court found Koziy had failed to reveal his wartime activities in his visa and naturalization applications, and therefore, lacked good moral character. The district court held Koziy had illegally procured his citizenship because he had failed to satisfy a statutory condition precedent to naturalization.

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[3]Murchuk's credibility as a witness must be analyzed in light of two letters he sent to the office of special investigations in the Department of Justice. In those letters, he claimed that the Department of Justice's investigation into Koziy's past was a KGB-Jewish plot to destroy Ukranian Nationalists.

Unless the district court's factual findings are clearly erroneous, we are compelled to abide by them. *Hamm*, at 650; *Lincoln*, at 939. The district court's factual findings are not clearly erroneous.

b. Procurement of Citizenship by Concealment of a Material Fact or by Willful Misrepresentation.

[7, 8] Under 8 U.S.C.A. §1451(a), if naturalization is procured by concealment of a material fact or by willful misrepresentation, it must be revoked. In a denaturalization proceeding, concealed facts are material if either they would have warranted denial of citizenship if known, or if the disclosure might have led to an investigation into other facts warranting denial of citizenship. *United States v. Fedorenko* 597 F.2d 946, 949-52 (5th Cir.1979), *aff'd Fedorenko v. United States*, 449 U.S. 490, 101 S.Ct. 737, 66 L.Ed.2d 686 (1981). The district court found that Koziy had failed to disclose his affiliation with the OUN in his application to file a petition for naturalization. It held that if he had disclosed his affiliation with the organization, it would have led to an investigation into other facts which might have warranted a denial of citizenship. The district court, therefore, held Koziy's naturalization was procured by a concealment of a material fact. The district court found that Koziy never disclosed his membership in the Ukranian Police force. It ruled that if he had disclosed his connection with the police force in his visa application, his application would have been rejected outright, or at the least, an investigation would have commenced which might have led to a denial of citizenship. His failure to disclose his affiliation with the police force, therefore, was a concealment of a material fact, and his

naturalization was procured by concealment of a material fact. These findings are not clearly erroneous.

II. Koziy's Constitutional Claims

[9] Koziy contends that at the time he obtained citizenship, the statutory provisions for denaturalization failed to include illegal procurement. Koziy argues, therefore, that the district court's reliance on illegal procurement as a basis of denaturalization violated the due process clause of the fifth amendment and the ex post facto clause. Although Koziy is correct in contending that the statutory provisions for denaturalization did not include illegal procurement at the time he obtained citizenship, we find that the district court's utilization of illegal procurement as a basis for denaturalization did not violate Koziy's constitutional rights.

In *Johannessen v. United States*, 225 U.S. 227, 32 S.Ct. 613, 56 L.Ed. 1066 (1912), the Supreme Court was faced with a similar challenge in a denaturalization proceeding. When Johannessen was admitted to the United States, the statute did not include illegal procurement as a basis for denaturalization. Johannessen contended that the utilization of illegal procurement as a basis for denaturalizing him violated the ex post facto clause. The Court disagreed and declared the usage of illegal procurement did not violate Johannessen's constitutional rights. *Johannessen*, at 242-43, 32 S.Ct. at 617. The Court stated: "The act imposes no punishment upon an alien who has previously procured a certificate of citizenship by fraud or other illegal conduct. It simply deprives him of his ill-gotten privileges." *Johannessen*, at 242-43, 32 S.Ct. at 617.

In the present dispute, the government's utilization of illegal procurement as a basis for revoking Koziy's citizenship did not violate Koziy's constitutional rights. It only deprived Koziy of his ill gotten gains. The utilization of illegal procurement deprived Koziy of a privilege that was never rightfully his. *See Johannessen*, at 241-43, 32 S.Ct. at 616-617.

III. The Court's Exclusion of Koziy's Witnesses

The district court set August 17, 1981, as a deadline for listing witnesses to be called at trial. Koziy failed to list two witnesses, O'Conner and Martin, by the deadline. The district court, therefore, prohibited the witnesses from testifying. Koziy contends that the district court abused its discretion in excluding his witnesses. The government argues the district court acted properly in excluding Koziy's witnesses.

[10, 11] A district court's order concerning the exclusion of witnesses will be upheld unless there has been a clear abuse of discretion. *Port Terminal and Warehousing v. John S. James Co.*, 695 F.2d 1328, 1334-35 (11th Cir.1983); *Keyes v. Lauga*, 635 F.2d 330, 334-35 (5th Cir.1981); *Calamia v. Spivey*, 632 F.2d 1235, 1237 (5th Cir.1980). In determining whether the district court abused its discretion in excluding witnesses, the reviewing court should take the following factors into account: (1) bad faith on part of the parties seeking to call the witnesses not listed in his pretrial memorandum, (2) ability of the party to have discovered the witnesses early, (3) validity of the excuse offered by the party, (4) willfulness of the party's failure to comply with the court's order, (5) party's intent to mislead/confuse his

adversary, and (6) importance of excluded testimony. *Myers v. Pennypack Woods Home Ownership Association*, 559 F.2d 894, 904-905 (3d Cir.1977).

[12] After reviewing each factor listed in *Pennypack* as it relates to this case, we find that the district court did not abuse its discretion in excluding Koziy's two witnesses. Koziy failed to inform the court that he desired to call O'Conner, a Displaced Persons Commission expert, until September 16, 1981. Koziy, however, knew that the government was claiming that he violated the Displaced Persons Act at the time of the filing of the complaint, 1979. Moreover, when Koziy was deposed on November, 1980, he was questioned about his application to the Displaced Persons Commission. Koziy, therefore, knew as early as 1979 that the Displaced Persons Act was at issue. Koziy had the ability to call O'Conner at any point after the filing of the complaint. Koziy offered no excuse for his failure to call O'Conner prior to the court's deadline and therefore, Koziy willfully failed to comply with the court's order. The government also lacked the opportunity to depose O'Conner. The district court, therefore, did not abuse its discretion in precluding O'Conner from testifying.

Koziy failed to inform the court that he desired to call Rene C. Martin, a handwriting consultant, until September 9, 1981. The trial commenced six days later. In November, 1980, the government notified Koziy of its desire to obtain handwriting exemplars for purposes of conducting an analysis and handwriting comparison of certain Nazi documents. Koziy refused, and the district court compelled him to comply. Koziy, therefore, knew that his handwriting was at issue in the case. His

failure to obtain Rene C. Martin before the court's deadline displays bad faith.

Koziy contends that since the government had the opportunity to depose Martin, there was no unfair surprise. While the government did not depose Martin, an attorney who was not involved in the dispute took the deposition. The district court, therefore, did not abuse its discretion in excluding Martin as it would have resulted in an unfair surprise to the government. Our holding is supported by the district court's careful consideration of the issue before reaching a decision. It requested memoranda of law concerning the dispute and then precluded Koziy's witnesss from appearing.

IV. The Trial Court's Admission of the Anmeldung, the Abmeldung, and the Inimical list

(a) the anmeldung, the abmeldung

[13] Koziy contends the court erred in admitting certain documents for various reasons. Koziy contends the anmeldung and the abmeldung lack proper authentication, are forgeries, are irrelevant and immaterial, and are hearsay. The government contends that the district court properly admitted the anmeldung and the abmeldung into evidence.

The Federal Rules of Evidence state that the requirement of authentication "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed.R.Evid. 901(a). A district court's determination that an article of evidence has been properly authenticated will not be overturned unless there is no competent evidence in the record to

support it. *Bury v. Marietta Dodge*, 692 F.2d 1335, 1338 (11th Cir.1982); *Meadows and Walker Drilling Co. v. Phillips Petroleum Co.* 417 F.2d 378, 382 (5th Cir.1969). The government produced two expert witnesses to authenticate the anmeldung and the abmeldung. The government produced Dr. Raul Hilberg, a renowned expert on the holocaust, and Dr. Kantu, an expert on written documents. Dr. Hilberg testified he had seen other anmeldungs and abmeldungs and that the ones involves in the present dispute were very similar to the ones he had seen. Dr. Kantu testified that the anmeldung and abmeldung were not executed before its purported date. These two witnesses alone produced sufficient evidence to support the district court's authentication of the anmeldung and the abmeldung.

[14] The Federal Rules of Evidence, however, add support to the district court's finding that the anmeldung and the abmeldung were properly authenticated. Under Fed.R.Evid. 902(3), a document is self-authenticated if it purports

> to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official positon (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation.

A Russian official authorized to authenticate such documents attested to the anmeldung and the abmeldung. These documents, therefore, were self authenticated under rule 902(3). Since there was competent evidence in the record to support the district court's finding that the anmeldung and the abmeldung were properly authenticated, the district court did not abuse its discretion by allowing them into evidence.

[15, 16] Whether or not the anmeldung or the abmeldung were forgeries fails to go to their admissibility, but rather to the weight of the evidence. The documents are relevant and material.

The documents are not inadmissible hearsay because they come within the ancient document's exception to the hearsay rule. Fed.R.Evid. 803(17). The documents were authenticated, and they have been in existence for twenty years or more.

(b) Inimical List

[17] The district court admitted into evidence a list the DPC compiled containing all organizations hostile to the United States. Koziy contends that the government failed to show that the OUN was hostile to the United States at the time Koziy applied for citizenship, and therefore, the inimical list has no probative value. The Fifth Circuit has consistently held that evidence should be admitted rather than excluded if it has any probative value at all. *United States v. Holladay*, 566 F.2d 1018, 1020 (5th Cir.), *cert. denied*, 439 U.S. 831, 99 S.Ct. 108, 58 L.Ed.2d 125 (1978); *Sabatino v. Curtiss National Bank of Miami Springs*, 415 F.2d 632, 635-36 (5th Cir. 1969, *cert. denied* 396 U.S. 1057, 90 S.Ct. 750, 24 L.Ed.2d

752 (1970). Doubts must be resolved in favor of admissibility. *Holladay*, at 1020; *Sabatino*, at 636. The inimical list had some probative value. The district court therefore properly allowed it into evidence. The amount of probative value the inimical list contains goes to the weight of the evidence, not to its admissibility.

CONCLUSION

For the reasons stated above, we find that the district court committed no error in the proceedings. Accordingly, we affirm the order of the district court.

AFFIRMED.

ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

FILED MAR 29 1982

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 79-6640-Civ-JCP

UNITED STATES OF AMERICA

v.

BOHDAN KOZIY,

Defendant:

ORDER AND JUDGMENT

This action came on for trial before the Court, and the issues having been duly tried and the Court having issued its Findings of Fact and Conclusions of Law, it is

ORDERED and ADJUDGED:

1. That the Order of February 9, 1956 of the Supreme Court of New York, County of Oneida, admitting the defendant to citizenship is revoked and set aside and Certificate of Naturalization No. 7115205 shall be cancelled.

2. The Clerk of Court shall transmit a copy of this Order and Judgment to the Clerk of the Supreme

Court of New York, County of Oneida, who shall cancel the Certificate of Naturalization No. 7115205 pursuant to 8 U.S.C. §1451(h).

3. The defendant, upon receiving notice of this Order and Judgment, shall surrender and deliver his Certificate of Naturalization to the Attorney General.

DONE and ORDERED at West Palm Beach, Florida, this 29th day of March, 1982.

James C. Paine
United States District Judge

cc: Department of Justice
Philip Carlton, Jr., Esq.

FINDINGS OF FACT OF THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA.

FILED MAR 29 1982

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 79-6640-Civ-JCP

UNITED STATES OF AMERICA

v.

BOHDAN KOZIY,

Defendant.

FINDINGS UNDER RULE 52

The United States of America commenced the instant action on November 20, 1979 pursuant to the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. §1451(a), to revoke the United States citizenship of Bohdan Koziy. The defendant was admitted to the United States for permanent residence on December 17, 1949 pursuant to the Displaced Persons Act of 1948. On February 9, 1956, the defendant became a United States citizen when the Supreme Court of New York, at Utica, New York, granted defendant's Petition for Naturalization and issued him a Certificate of Naturalization.

These findings are made pursuant to Rule 52 of the Rules of Civil Procedure after trial of the issues in

the cause by the court without a jury. Plaintiff, United States of America was represented by Michael Wolf, Esq., Kathleen Coleman, Esq., Jovi Tenev, Esq. and Neal Sher, Esq. and defendant, Bohdan Koziy was represented by Philip Carlton, Esq. in the trial held in West Palm Beach, Florida which commenced September 15, 1981 and was concluded October 2, 1981. The evidence submitted by the parties and argument of counsel provided by post trial memoranda were considered by the undersigned and resulted in the following findings.

Findings of Fact

1. The region of Stanislau, currently known as Ivano-Franckovsk, was incorporated into the U.S.S.R. in 1939. Prior to that time Stanislau was part of Poland which was invaded by Germany in September 1939. Thereafter, Germany controlled western Poland while the U.S.S.R. controlled eastern Poland which was known as the Ukraine or Galicia.

2. From 1939 until 1941 the Jews who lived in German occupied Poland were moved to ghettos and their property was confiscated.

3. In the summer of 1941 Germany invaded the Soviet Union. For a short time the Ukrainians believed that they had been liberated from the U.S.S.R. and that the region would become a separate self-governed political entity. This expectation was shortlived since Nazi Germany soon installed its own civil and military administration.

4. At this time there were approximately 500,000 Jews in Galicia. The population of the city of Stanislau

prior to World War II was about 50,000 people. Of this number approximately 50 percent were Jewish.

5. About 9 kilometers from the city of Stanislau was the small town of Lisets. In 1941 about 2,000 people inhabited Lisets. There were approximately 20 to 40 Jewish families there giving the town an estimated population of somewhere between 160 to 200 Jews.

6. By the middle of 1941 German policy changed from one requiring the emigration of all Jews to seeking their complete annihilation.[1] The latter was euphemistically referred to as the "final solution."

7. Plaintiff's exhibit 10 provided documentary evidence of this policy. This exhibit in German is known as the Oberfeld kommandantur 365, which is a monthly report for August 16 through September 15, 1942. It states that by December 31, 1942 all Jews of the Galicia District should be settled out. Professor Raul Hilberg testified that the words "murder," "killing," "genocide," etc. never appeared in German documents. Other words such as "final solution" or "resettled" were used in their place.

8. Plaintiff's exhibits four and five establish that the Germans utilized local citizens in the occupied territories to assist the German police units. Plaintiff's exhibit four is a letter attributed to Heinrich Himmler and dated July 25, 1941. In the letter it states that it is necessary that additional protection units be established expeditiously from the ethnic groups of the conquered territories. Included in the complement of these protection units would be Ukrainians. The letter goes on to indicate

some of the logistical details of utilizing indigenous population as part of the security police.

9. Plaintiff's exhibit five is an order from Daleuge dated November 6, 1941.[2] This document goes into some detail as to the composition of the various protective forces and manner of assigning individuals to these forces and the maintenance and compensation for those individuals within the forces. It is noted that this document includes a provision that the members of these self-contained units receive free health care within the scope of the health care provisions applicable for the Reich police.

10. In the German occupied areas a number of prohibitions and proscriptions were placed upon Jewish residents. For example, all Jewish residents were required to wear arm bands containing the Star of David. Further, their property was forfeited and when walking they were required to use the street as opposed to sidewalks. Such rules were enforced by the indigenous police who, in Galicia, were manned by Ukrainians.

11. Within two months of the German occupation of Poland the German efforts to exterminate the Jews were brought to Galicia. In August of 1941 Rabbis in the city of Stanislau were shot.

12. On October 12, 1941 an estimated 8,000 to 12,000 Jews were murdered on the outskirts of Stanislau by the Germans and their collaborators.

13. Ghettos for the containment of Jews were established in Galicia by the end of 1941. Efforts were made to transport Jews to the nearest ghetto.

14. In Stanislau a ghetto was formed approximately two weeks after the previously described October 12 action. The Jews were kept in the ghetto involuntarily. They were guarded by Jews inside the ghettos and outside by Germans and Ukrainian police. Food was rationed and only the minimal quantities were available. Many died of starvation and disease.

15. In addition to the killings carried out in Stanislau, the Germans also deported thousands of Jewish residents of the city to mass extermination camps. Belzec was the death camp nearest to Stanislau, being a few hours away by train. Approximately 500,000 people were executed there.

16. Between the fall of 1941 and spring of 1942 Jews who resided in the area surrounding Stanislau were brought to live in the ghetto. These included Jews who lived in the town of Lisets. In 1942 there were a number of actions in the Stanislau region which resulted in heavy Jewish casualties. According to Professor Hilberg's calculations in March of 1942, 2,000 were shot, in April, 3,000, in June, 1,000 and in August 2,500 were shot.

17. The Galician "deportation" was concluded by the spring of 1943. According to the plaintiffs's exhibit number eleven, the Katzmann report of June 30, 1943, 434,329 Jews had been "evacuated." The report also details confiscations of Jewish property which occurred over the previous few months. The Katzmann report, titled as the final report of solution of the Jewish question in the district of Galicia, details and specifies the horrors, atrocities and barbarism which was carried

out by the Germans and their cohorts in their quest to exterminate the Jews in Galicia.[3]

18. The Stanislau ghetto was closed in June 1943. Thirteen months later the Soviets controlled the territory.

19. The Ukrainians were often friendly to the Germans as evidenced by plaintiff's Exhibit number nine which is the Oberfeld Kommandantur 365 for 16 November through 15 December 1941. Thus the Germans were able to use their own as well as indigenous police to guard the ghettos. Indigenous police had most of the functions of the German police.

20. In Galicia Ukrainian police assisted in transportation of Jews from their homes to the ghettos. They also participated with German police in security sweeps and in roundups for taking the Jews to Belzec.

21. Ukrainian police made significant contributions to roundups. They made up 50 percent of the police complement in Galicia. While Ukrainian police may have independently killed five to twenty Jews at a time, they would not engage in large scale mass murder unless done so by German order.[4] In Stanislau Ukrainian police made arrests inside the ghetto. At times they were with Germans and at other times they were on their own.[5]

22. Recruits for indigenous police had to be anti-communist and physically fit. Ukrainian police served the Germans voluntarily.

23. The defendant was born on February 23, 1923 in the town of Pukasiwci which was located in the

Stanislau region of Galicia. His given name was Bogdanus Kosij. He changed his name to Bohdan Koziy when he was naturalized as a United States citizen.

24. In the years 1936 through 1939 the defendant attended a Ukrainian private school located in Yavorew. He then attended trade school in Stanislau, starting in 1939. He took agriculture and tailoring courses for the next four to five months. The school was Russian controlled. Vacations were taken at Pukasiwci. He quit school in early 1940.

25. In 1939 the defendant began his participation in the Organization of Ukrainian Nationalists or OUN. He joined the Bandera faction which was named for its leader, Stephan Bandera. According to the defendant, the OUN succeeded the Ukrainian military organization or UWO. UWO members tended to be much older than the defendant's contemporaries.[6]

26. At the trial, defendant categorized himself as an OUN sympathizer, not as a member. However, he admits that he was involved. Other statements made by the defendant do not support his position that he was merely a sympathizer. For instance, his statement given to an INS interviewer on October 6, 1977 indicated that he was in the OUN organization, not that he was merely a sympathizer. In fact, he said he joined in 1939 and that the purpose of the movement was to fight the Russians. (Plaintiff's Exhibit 1-M). At the time the defendant was avowedly anti-communist. He testified that he never had any formal initiation. But he did use a pseudonym in connection with his OUN activities.

27. In August of 1941 the defendant's future father-in-law, Wasyl Ostapiak, became the Mayor of Lisets. He remained the Mayor of Lisets until December 1941 at which time he became the Mayor of the Lisets Commune under the German occupation.[7]

28. In the fall of 1941 the defendant returned to trade school in Stanislau. His attendance there appears to have been only as a cover for his resistance activities. Defendant admits to having been a courier for the OUN during the years of 1941 and 1942. He delivered messages in what were called szatafetos. He helped to supply the leader of the UPA with passports (Kenkartes), medication and supplies.

29. According to plaintiff's exhibit six, the Anmeldung, Mr. Koziy applied for social insurance on April 1, 1942 pursuant to his beginning employment as a Ukrainian policeman.[8] One of the witnesses, Jablonski, said that the defendant was one of five Ukrainian police stationed in Lisets. Mr. Jablonski testified that he had seen the defendant in a Ukrainian police uniform. The first time he saw him this way was in 1942 and thereafter saw him approximately once a week.[9]

30. In the summer of 1942 the Jews of Lisets were rounded up by the Ukrainian Police and forcibly relocated to the ghetto in Stanislau. Defendant participated in this round-up.

31. During 1942 the defendant was continuing some of his activities with the OUN.

32. The defendant's wife, Yaroslava Koziy the daughter of Wasyl Ostapiak, met the defendant in 1942

while he was still a student in Stanislau and attending a boys technical school.[10]

33. In January of 1943 Yaroslava took the defendant home to dinner in Lisets. At that time the defendant was living in Stanislau.

34. The defendant married Yaroslava June 19, 1943 in Lisets. The following day he and the Ostapiak family left for Stanislau and then on to Pukasiwci to have the traditional second wedding at the groom's house.

35. From August of 1943 to May of 1944 Mrs. Koziy only saw her husband sporadically. She resided during much of the balance of 1943 in Pukasiwci.[11]

36. In either January or February of 1944 Mrs. Koziy left Pukasiwci to go to Lisets to be with her mother when giving birth to her first child. She says that the last few weeks of her pregnancy took place during the German and Russian bombardment of Galicia. That first child was named Yarema and he was born April 28, 1944. The next month in May of 1944 Yaroslava returned to Pukasiwci to see her husband. It had been considerable time since she had last seen him.

37. Plaintiff's exhibit #7, the Abmeldung, indicates that the defendant left the Ukrainian police on January 31, 1944.[12] At that time defendant accelerated his activities with the OUN which included military actions against Russian partisans in the Stanislau regions.

38. In the latter part of June 1944 Yaroslava and Bohdan Koziy and their son returned to Lisets.

39. In July 1944 defendant and his wife and child, along with most of the Ostapiak family, left the Ukraine and moved to Germany.

40. Defendant resided in the area of Heide, Germany, working as a farmer, until the surrender of Germany in 1945.

41. After the surrender of Germany, defendant and his family became residents of several displaced persons camps operated in Germany by the International Refugee Organization, an agency of the United Nations.

42. Evidence concerning seven witnesses' photographic identifications of Mr. Koziy support the finding that the defendant was a Ukrainian policeman. This evidence was presented by video-taped depositions that were taken in Poland and the U.S.S.R.[13]

43. The defendant personally and single-handedly murdered the female child of Dr. Singer. During or after most of the Jews of Lisets were placed in the Stanislau ghetto, this child was sent to live with friends who were Poles. She eventually was given to a gentile Polish woman by the name of Jadwiga Spilarewicz. In the fall of 1943 Spilarewicz was warned that a Polish family in the area had been arrested for hiding Jews. She decided to move to Cracaw but stopped in Lisets to obtain money from a relative for the trip. While staying in her aunt's house, the child was apparently discovered. Two Ukrainian policemen came to the house. One of the policemen (tall and slim) accused Spilarewicz of hiding a Jewish child; she denied it. Upon protesting that the child was Polish, rather than Jewish, Spilarewicz was struck by that same policeman. After the police

ransacked the house and took money, they brought Spilarewicz and the child to the police station in Lisets. Spilarewicz was placed in a holding cell at the station and the child was taken from her. Spilarewicz did not observe what happened to the child. Subsequently, Spilarewicz was taken to the jail in Stanislau where she was kept for several weeks before being released.

Other residents of the village who had heard of the arrest were present at the police station when Spilarewicz and the child were taken into custody. Josef Jablonski, Anton Vatseb and Ganna Snigur were standing at different points behind the police station watching the events as they unfolded. They each observed a Ukrainian policeman drag the child outside to the courtyard behind the police station. As the child was pleading to be spared, the policemen shot and killed her at point blank range. Both Jablonski and Maria Il'kov'ska later saw the girl's body at the Jewish cemetary, along with the bodies of other Jews (e.g., the Kandlers) who had been killed at about the same time.

Snigur, Jablonski and Vatseb all testified that the policeman who murdered the girl was Bohdan Koziy. They all identified Koziy as having been tall, slim, fair-haired and young. They all remembered him as the mayor's son-in-law.

Both Jablonski and Vatseb were standing in positions outside the courtyard of the police station which allowed them ample opportunity to observe the Singer murder.

44. The defendant actively participated in the murder of members of a Jewish family named Kandler in the fall of 1943, particularly one Bernard Kandler.

45. Plaintiff's exhibit 1-C is an application for Immigration Visa and Alien Registration. It indicates that the applicant is Bogdanus (Bohdan) Kozij and within the application is a photograph of the applicant and his signature. The Court finds that the signature on the photograph is that of the defendant Bohdan Koziy.

46. Prior to October 27, 1949, defendant applied to the International Refugee Organization for certification as a refugee and displaced person within the meaning of the Constitution of that Organization. That certification was granted.[14]

47. The Displaced Persons Commission was an agency of the United States charged with the responsibility of processing visa applicants under the Displaced Persons Act of 1948, P.L. No. 80-774 (62 Stat. 1009). One of the provisions of that statute precluded the issuance of visas to persons who were members of or participants in movements hostile to the United States, such as Nazi and collaborationist organizations. It was the responsibility of the Displaced Persons Commission to identify such organizations and screen out their adherents.

48. Among the organizations found by the Displaced Persons Commission to be hostile collaborationist movements were the Organization of Ukrainian Nationalists, the Bandera group and the Ukrainian Police.

49. Those who were known to have participated in or have been a member of the OUN were ineligible to qualify as displaced persons under the Displaced Person Act of 1948.[15]

50. After receiving certification from the International Refugee Organization, defendant applied to the United States Displaced Persons Commission for designation as a displaced person entitled to admission to the United States under the Displaced Persons Act of 1948, P.L. No. 80-774 (62 Stat. 1009).

51. In interviews with officials of the Displaced Persons Commission defendant was required to provide information regarding his wartime activities. In the course of these interviews defendant misrepresented and/or concealed the following facts relating to his conduct during the war:

a. defendant stated that he was employed as a tailor's apprentice during the war, concealing his employment with the Ukrainian police;

b. defendant concealed his membership and/or participation in the OUN and the Bandera group.

c. defendant stated that he had been "evacuated by order of the German authorities" from the Ukraine to Germany.

52. Defendant's application to the Displaced Persons Commission was acted upon favorably in a Report dated October 27, 1949.

53. On November 18, 1949, defendant filed a visa application with the State Department consulate in Wentorf, Germany. Incorporated into and attached to the visa application was the aforementioned Report of

the Displaced Persons Commission. Defendant swore under oath that all information in the visa application and attached Report was truthful.

54. Defendant was issued a Visa on November 29, 1949.

55. On December 17, 1949, defendant and his family entered the United States at New York, New York.

56. On April 25, 1955 defendant filed an Application to File Petition for Naturalization and an accompanying Statement of Facts, together known as Form N-400. During a naturalization examination on July 25, 1955, defendant reviewed the contents of the N-400 with a naturalization examiner and swore that they were true.

57. Defendant's sworn Application (Form N-400) contains the following misrepresentations and concealments:

a. Defendant represented that the only organization of which he had ever been a member was the Boy Scouts (items 8, 9) concealing his admitted membership in the OUN, Bandera Group and an organization in the United States known as the Organization for the Defense of Four Freedoms for Ukraine, Inc.

b. Defendant claimed he had never committed a crime involving moral turpitude (item 18), concealing his acts of persecution and murder while he was a member of the Ukrainian police.

c. Defendant claimed he had never given false testimony to obtain benefits under the immigration and naturalization laws (item 18), concealing the false testimony given by him to the Displaced Persons Commission and the State Department during the visa application process and to the naturalization examiner at the time of his citizenship application.

58. On July 25, 1955 defendant filed his Petition for Naturalization. In that Petition he falsely swore (item 15) that he was "a person of good moral character."

59. On February 9, 1956, defendant was admitted to citizenship by the Supreme Court of New York, Oneida County, and issued Certificate of Naturalization No. 7115205.

CONCLUSIONS OF LAW

60. This is an action to denaturalize defendant under Section 340(a) of the Immigration and Naturalization Act, 8 U.S.C. §1451(a). Under that provision citizenship must be revoked if defendant either:

(a) illegally procured his citizenship, or

(b) procured his citizenship by concealment of a material fact or by willful misrepresentation.

61. To prevail the Government must prove its case by "clear, unequivocal, and convincing" evidence

and "not leave the issue in doubt." *Schneiderman v. U.S.*, 320 U.S. 118 (1943), *Federenko v. U.S.*, 449 U.S. 490 (1981).

62. Citizenship is lllegally procured if "some statutory requirement which is a condition precedent to naturalization is absent at the time the petition for naturalization was granted," H.R. Rep. No. 1086, 87th Cong., 1st Sess. 39. Lawful admittance under a valid visa pursuant to the Displaced Persons Act of 1948, P.L. No. 80-774 (62 Stat. 1009) was a statutory condition precedent to defendant's legal procurement of citizenship. Section 316 of the Immigration and Nationality Act, 8 U.S.C. §1427, 1429.[16]

63. Under section 13 of the Displaced Persons Act no visa could be issued to any person who was a "member of, or participated in, any movement hostile to the United States or the form of government of the United States."

64. The defendant's employment in the Ukrainian Police made him a member of and participant in a movement hostile to the United States and was thus ineligible for a visa under Section 13 of the Displaced Persons Act.

65. The defendant's active participation in the Organization of Ukrainian Nationalists (OUN) also made him a member of and a participant in a movement hostile to the United States and was thus ineligible for a visa under Section 13 of the Displaced Persons Act.

66. Section 2(b) of the Displaced Persons Act incorporated within it the eligibility standards of the

constitution of the International Refugee Organization (IRO), and limited the issuance of visas to those persons who satisfied these IRO standards.[17]

67. In order to be classified as a refugee or displaced person of concern to the IRO, one had to meet the definitional requirements of refugees and/or displaced persons in Part I, Annex I, of the IRO Constitution and not be excluded by Part II.

68. Section 2(b) of the Displaced Persons Act by incorporating the IRO constitution provided that visas could not be issued to persons who, during World War II:

(a) assisted the enemy (i.e., Nazi Germany) in persecuting civilians, or

(b) voluntarily assisted the enemy forces (i.e., military forces).

69. By reason of his employment with the Stanislau Kommando of the Ukrainian Police, defendant assisted Nazi Germany in persecuting civilians.

70. By reason of his personal acts of persecution and murder of civilians while employed as a Ukrainian policeman in Lisets, defendant assisted Nazy Germany in persecuting civilians.

71. By reasons of his employment with the Ukrainian Police defendant voluntarily assisted the enemy forces of Nazi Germany.

72. By engaging in military actions against Soviet partisans and by training others to fight Soviet partisans defendant voluntarily assisted the enemy forces of Nazi Germany.

73. For each of the independent grounds enumerated in paragraphs 69-72, above, defendant was ineligible for a visa under Section 2(b) of the Displaced Persons Act.

74. Section 10 of the Displaced Persons Act provided, *inter alia*

> Any person who shall willfully make a misrepresentation for the purpose of gaining admission in the United States as an eligible displaced person shall thereafter not be admissible in the United States.

75. In his Displaced Person Commission Report, affirmed and sworn to in his Visa application, defendant misrepresented and concealed the material facts enumerated in paragraph 51 a and b of the Findings of Fact.

76. Truthful disclosure by defendant of any one of the aforementioned misrepresented facts would have resulted in outright rejection of defendant's visa application. Section 2(b) of the Displaced Persons Act. Defendant, therefore, was ineligible for a visa under Section 10 of the Displaced Persons Act. *Fedorenko v. United States, supra.*

77. If the defendant had disclosed the true facts during the visa application process, that disclosure

would have led to further investigations that might have resulted in the denial of a visa. *United States v. Fedorenko*, 597 F.2d 946 (5th Cir. 1979).

78. Section 316(a) of the Immigration and Nationality Act, 8 U.S.C. §1427 requires as a condition precedent to citizenship that the petitioner be and have been at all relevant times a person of good moral character.[18]

79. Both Mr. Koziy's employment with the Ukrainian police and his participation in acts of persecution and murder of civilians each demonstrate, independently of the other, that he lacked the good moral character required for citizenship.

80. Section 101(f)(6) of the I & N Act, 8 U.S.C. §1101(f)(6), provides that persons who have given false testimony for the purpose of obtaining benefits under the immigration and nationality laws lack the good moral character required for citizenship.

81. In applying for a visa, defendant gave false testimony as described in paragraphs 51 and 53.

82. In applying for naturalization, defendant gave false testimony as described in paragraphs 56, 57 and 58.

83. By reason of the false testimony given by defendant to obtain benefits under the immigration and nationality laws (i.e., visa and naturalization), defendant lacked the good moral character required for citizenship.

84. Under Section 340(a) of the I & N Act, 8 U.S.C. §1451(a), concealment or misrepresentation of material facts at the time of naturalization mandates revocation of citizenship when either (1) "facts were suppressed which, if known, would have warranted denial of citizenship, or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship." *Chaunt v. United States*, 364 U.S. 350, 355 (1966).

85. In his Application to File Petition for Naturalization and his accompanying Statement of Facts, and in his Petition for Naturalization defendant concealed material facts and willfully misrepresented facts.

86. Truthful disclosure by defendant of any one of the misrepresented facts enumerated in paragraphs 57 and 58 would have resulted in the denial of defendant's citizenship application.

87. Truthful disclosure by defendant of any one of the misrepresented facts enumerated in paragraphs 57 and 58, at a minimum, would have resulted in suspension of defendant's citizenship application and an investigation which might have discovered other facts warranting denial of citizenship.

88. Bohdan Koziy was never lawfully admitted into the United States for permanent residence. 8 U.S.C. 1427(a).

(a) As a member of or a participant in movements hostile to the United States, the defendant was ineligible

for a visa under Section 13 of the Displaced Persons Act.

(b) Since the defendant assisted Nazi Germany in persecuting civilians and voluntarily assisted the military forces, he was ineligible for a visa under Section 2(b) of the Displaced Persons Act.

(c) The defendant made willful misrepresentations for the purpose of gaining admission into the United States and was thus ineligible for a visa under Section 10 of the Displaced Persons Act.

89. Bohdan Koziy's citizenship was procured illegally.

(a) The defendant was not lawfully admitted into the United States. 8 U.S.C. 1427(a)(1).

(b) The defendant lacked the good moral character required for citizenship. 8 U.S.C. 1427(a)(3).

90. Bohdan Koziy's citizenship must be revoked. 8 U.S.C. 1451(a).

(a) The defendant's citizenship was illegally procured.

(b) The defendant procured his naturalization by concealment and willful misrepresentation of material facts.

Entered at West Palm Beach, Florida, this 29th day of March, 1982.

/s/ James I. Paine
United States District Judge

cc: Dept. of Justice (Washington, D.C.)
Philip Carlton, Jr., Esq.

FOOTNOTES

[1]Much of the historical evidence was presented by Dr. Raul Hilberg, an expert on the subject of the annihilation of European Jews. Dr. Hilberg is a professor in the Department of Political Science of the University of Vermont and the author of *The Destruction of the Enrupean Jews*. He has participated in other denaturalization proceedings.

[2]Daleuge was in charge of the German Order police.

[3]In the Katzmann Report, according to Professor Hilberg, the words "special treatment" and "evacuation" are equivalent to the word "killing."

[4]Yet one eye witness, Maria Froelich, did not even see the Ukrainian police enforce the arm band regulation.

[5]There were a number of police organizations in existence at the time. They were the gestapo, the S.S., the Shuts Policia which were made up of Ukrainians, Polish and Germans. The criminal police also made up of the same, the order police which were composed of Jewish people and the Bonshuts police which was made up of Ukrainian, Polish and German people.

[6]According to the witness Jablonski, the U.P.A. or Ukrainian Uprising Army was the same organization as the Banderaofsky. U.P.A. cooperated with the Germans.

[7]The Lisets commune included the town of Lisets and a number of neighboring communities.

[8]Plaintiff presented the testimony of Antonio A. Cantu, Ph.D. who was a physicist and chemist with the Department of the Treasury. Dr. Cantu performed ink and paper analysis on Plaintiff's exhibits 6 and 7. He concluded "in the examination I was not able to find any evidence which would suggest that these documents were prepared after their purported dates." Defendant presented no evidence to controvert Dr. Cantu or to challenge the authenticity of these documents.

[9]According to the defendant in the summer of 1942 he met with a resistance member known to him as Marko but whose real name was Irodenko. These meetings took place in Lisets where Marko was a Ukrainian policeman and defendant obtained passports from Marko. Defendant categorically denied ever being a Ukrainian policeman. He admits having worn the Ukrainian police uniform once in either 1943 or 1944 as a disguise, but never in 1941 or 1942.

[10]His wife said that he was not in the Ukrainian police at that time and she never saw him in a uniform.

[11]According to the defendant he was wounded in the arm and left leg by machine guns during an OUN sponsored bombing raid on a train station. Defendant was treated in a small Ukrainian Partisan hospital. The witness Maria Kolodij testified that she saw Mr. Koziy at this hospital sometime between September and November 1943. Defendant asserts that since he was injured in the fall of 1943, he could not have been in the Ukrainian police at the same time as is posited by the government. The plaintiff attempted to show that this injury occurred in 1944 after the defendant completed his police employment.

The Court finds it unnecessary to reconcile this factual conflict in the sequence of events. That the defendant may have incurred a temporary disabling injury in the fall of 1943 does not preclude a finding that he had been a Ukrainian policeman and may have continued to be so employed for a few more months.

[12]Wasyl Ostapiak testified that he would have objected to his daughter marrying a Ukrainian policeman. It is interesting to note that Mrs. Koziy moved back to Lisets from Pukasiwci at this time. This prior physical separation may be one reason that the defendant's wife never saw him in a police uniform. While the possible dynamics between family pressures and the defendant's employment make for interesting speculation, there is not enough evidence in this regard to permit a finding of fact.

[13]A number of the witnesses who were deposed in either Poland or the U.S.S.R. were presented with photo spreads containing eight pictures. This presentation was made by an investigator

some time before the actual taking of the depositions. At the time of the deposition the witnesses recited the manner in which the photo spread identification was undertaken and indicated which picture, if any, they identified as either the defendant Bohdan Koziy or his wife Yaroslava.

Witness Josif Waclaw Jablonski selected photographs E and G or plaintiff's exhibit 22-A2. These photographs represented his best recollection of what Bohdan Koziy looked like when he knew him. Mr. Jablonski selected photograph D of plaintiff's exhibit 22-A3 as representing someone who reminded him of Yaroslava Koziy. Mr. Jablonski had testified that Bohdan Koziy was a Ukrainian policeman and that he had seen Bohdan Koziy commit two murders in the fall of 1943.

Yosif Frankovich Il'kovs'kii testified that Bohdan Koziy was the Ukrainian police Chief's assistant. He had seen the defendant wearing a uniform and carrying weapons. Photograph 6 of plaintiff's exhibit 22-F was selected by Mr. Il'Kovs'kii as that person he remembered to be Bohdan Koziy.

Anna Frankivna Snigur became thirteen years old in May 1943. She testified that Bohdan Koziy was a Ukrainian policeman.

The witness selected photograph 6 of plaintiff's exhibit 22-D. Plaintiff's counsel conceded at the time of trial that the incorrect picture was identified by this witness. It should be noted that the witness said that the photograph was not Koziy's face but showed his hair as she remembered it.

Maria Antoniva Il'kovs'ka testified that the defendant was a Ukrainian policeman in Lisets. She said that she saw the defendant taking Jews to the ghetto. This witness selected photograph 7 of plaintiff's exhibit 22-G1 as that photograph that looked like Yaraslava Ostapiak. When presented with the photographs in plaintiff's exhibit 22-G2, Mrs. Il'kovs'ka selected photograph number 6 as being a photograph of Mr. Koziy when he was young.

Anton Micheylovich Vatseb chose photograph number 2 of plaintiff's exhibits 22-E1 as being someone from the Ostapiak

family. He also said that photograph number 2 of plaintiff's exhibit 22-E2 looked like Koziy. Mr. Vatseb links the defendant to acts of murder.

Jadwiga Spilarewicz, who had testified that Ostapiak's daughter had married a policeman, identified photograph D of plaintiff's exhibit number 22-B as being that same person.

Karol Koluszko when presented with eight male photographs selected two photographs which reminded him of Bohdan Koziy. These were photographs E and G of plaintiff's exhibit 22-C1. This witness chose photograph D of plaintiff's exhibit C-2 as being a photograph that reminded him of Yaraslava Ostapiak's sister. Mr. Koluszko said that he knew the defendant to be a Ukrainian policeman married to the Mayor's daughter. He said that he saw Bohdan Koziy arrest the witnesses' uncle and grandfather. He also saw defendant at the wedding reception by looking through the window from the outside of Wasyl Ostapiak's house.

The photographs selected by Il'kovs'ka, Il'kovs'kii and Vatseb to be of the defendant are identical to the photograph in plaintiff's exhibit 1-G. This photograph is attached to Bohdan Koziy's "Declaration of Intention" and is part of the defendant's immigration file. Photograph E of exhibit 22-A2 selected by Jablonski and photograph E of exhibit 22-C1 selected by Koluszko are also the same as the photograph in exhibit 1-G. The second photographs selected by Jablonski and Koluskos were of the same person.

As to the photographs of the females, the witnesses selected the same photograph. These photographs appear to be of the same person as the photo in plaintiffs exhibit 2-A, which is Yaroslava Koziy's "Application for Immigration Visa and Alien Registration."

These photographic identifications were reliable when considering all the circumstances. The witnesses had ample opportunity to view the defendant and they were also accompanying physical descriptions which favorably buttress the identifications. There was no evidence presented that the photographic spreads were either impermissibly suggestive or in some other way tainted

the witnesses' ability to objectively select those photographs which best protrayed their recollection of Bohdan Koziy.

The defendant elected to waive his right to be present at the overseas depositions and was unable to cross-examine these witnesses. Thus the defendant was limited in his ability to challenge the identification evidence. Nonetheless, the consistency of the identifications and physical descriptions are strongly indicative of the accuracy of this evidence.

[14]The plaintiff had as witnesses a number of persons who were directly involved in the processing of refugees under the International Refugee Organization and the Displaced Persons Commission. Michael Thomas, who as of July 1, 1947 had two years with the United Nations Relief and Rehabilitation Agency worked with the preparatory commission of the IRO. He was the Chief of eligibility in the British zone of Germany and was in charge of field eligibility officers. In August of 1948 he became Chief Eligibility Officer and remained in that position until August of 1950. Mr. Thomas testified that Annex 1 of Article 2a of the IRO Constitution prohibits people who served as police during the German occupation to be eligible for IRO assistance. He also testified that one who voluntarily travels from his home country to Nazi Germany would not be a displaced person and thus would not be eligible for IRO assistance. All applicants were required to have the IRO interview them and to determine their eligibility for United States Displaced Person Commission. Only those who were IRO eligible qualify under the Displaced Person Act for United States Visa.

[15]William B. Carmody, a case analyst for the Displaced Person Commission from 1948 to 1952 testified that membership in an organization on the inimical list would make the applicant ineligible under the Displaced Person Act. He also testified that those who worked as police during the German occupation were also not eligible. Plaintiff's exhibit 16 which is the inimical list of the Displaced Persons Commission, listed the OUN as an inimical organization. Plaintiff's composite exhibit 18 indicates that a number of applicants were rejected by the Displaced Person Commission for

their participation in the OUN or the Bandera faction and for being former indigenous police under the German occupation.

[16]Title 8 U.S.C. §1427(a) provides in pertinent part: "No person ... shall be naturalized unless such petitioner, (1) immediately preceding the date of filing his petition for naturalization has continuously, after being lawfully admitted for permanent residence ..."

[17]Section 2(b) of the Displaced Persons Act provided that: "Displaced person" means any displaced person or refugee as defined in Annex I of the Constitution of the International Refugee Organization and who is the concern of the Interntional Refugee Organization.

[18]8 U.S.C. §1427(a)(3) provides: "(a) No person, except as otherwise provided in this subchapter, shall be naturalized unless such petitioner ... during all the period referred to in this section subsection has been and still is a person of good moral character ..."

8 U.S.C. §1427(e) provides: "In determining whether the petitioner has sustained the burden of establishing good moral character and the other qualifications for citizenship specified in subsection (a) of this section, the court shall not be limited to the petitioner's conduct during the five years preceding the filing of the petition, but may take into consideration as a basis for such determination the petitioner's conduct and acts at any time prior to the period.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT.

United States Court of Appeals
for the Eleventh Circuit

No. 82-5749

D.C. Docket No.79-6640-CIV-JCP

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

BOHDAN KOZIY, a/k/a BOGDANUS KOSIJ,
a/k/a BOHDAN JOZIJ,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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Before HENDERSON and HATCHETT,
Circuit Judges,
and JONES,
Senior Circuit Judge

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for

the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, AFFIRMED;

It is further ordered that defendant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: Februay 27, 1984
For the Court: Spencer D. Mercer, Clerk
By: /s/ Illegible
Deputy Clerk

ISSUED AS MANDATE: APR 20 1984

ORDER ON PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT.

in the
United States Court of Appeals
for the Eleventh Circuit

NO. 82-5749

U.S. COURT OF APPEALS, ELEVENTH CIRCUIT
FILED APR 2 1984
Spencer D. Mercer, Clerk

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

BOHDAN KOZIY, a/k/a BOGDANUS KOZIJ,
a/k/a BOHDAN JOZIJ,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING
(April 2, 1984)

Before HENDERSON, HATCHETT, and JONES,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ John W. Hatchett
United States Circuit Judge

REHG-4
(Rev. 6/82)